

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

9	TOMAS VELO-PEREZ and ERNESTO CABRERA,	No. CR 05-00543 CW
		No. C 07-05401 CW
10	Movants,	No. C 07-05633 CW
11	v.	ORDER DENYING
12	UNITED STATES OF AMERICA,	MOVANTS' SECTION
13	Respondent.	2255 MOTIONS FOR
		REDUCTION IN
		SENTENCES

16 In two separate motions, Movants Thomas Velo-Perez and Ernesto
17 Cabrera, federal prisoners incarcerated at the California City
18 Correctional Center, move under 28 U.S.C. § 2255 to vacate, set
19 aside, or correct their sentences. Respondent United States of
20 America opposes the motions. Having considered all of the papers
21 filed by the parties, the Court DENIES the motions.

22 BACKGROUND

23 The following facts are taken from the documents and
24 transcripts in the criminal case United States v. Thomas Velo-Perez
25 and Ernesto Cabrera, CR 05-00543 CW. On or about August 15, 2005,
26 Movants agreed to distribute methamphetamine to a Confidential
27 Source (CS) who was cooperating with law enforcement. Movant Velo-
28 Perez negotiated a price of \$41,000 for approximately five pounds

1 of methamphetamine and arranged for Movant Cabrera to bring it to
2 the CS. Pursuant to plea agreements, Movants plead guilty to one
3 count of violating 21 U.S.C. § 846, conspiracy to distribute
4 methamphetamine; on the motion of Respondent, counts two and three
5 of Cabrera's indictment were dismissed and counts two through five
6 of Velo-Perez' indictment were dismissed. On May 23, 2007, each
7 Movant was sentenced to 108 months in prison to be followed by five
8 years of supervised release. Neither Movant filed a direct appeal
9 of his sentence.

10 On October 23, 2007, Movant Velo-Perez filed his § 2255 motion
11 and on November 6, 2007, Movant Cabrera filed his § 2255 motion.
12 Both Movants argue that their due process and equal protection
13 rights have been violated because, due to their deportable alien
14 status, they cannot be housed in a minimum security facility or
15 community correctional center, and thus, the Court should grant
16 them a downward departure in their sentences. On February 28,
17 2008, Respondent filed a separate response to each motion. Movant
18 Cabrera filed a reply in which he argues that he received
19 ineffective assistance of counsel and that the Court erred in not
20 granting him a downward departure for minimal participation in the
21 crime and for cooperation. Movant Velo-Perez has not filed a
22 reply.

23 LEGAL STANDARD

24 A prisoner, in custody under sentence of a federal court,
25 making a collateral attack against the validity of his or her
26 conviction or sentence must do so by way of a motion to vacate, set
27 aside or correct the sentence pursuant to 28 U.S.C. § 2255 in the

1 court which imposed the sentence. Tripati v. Henman, 843 F.2d
2 1160, 1162 (9th Cir. 1988). Section 2255 was intended to alleviate
3 the burden of habeas corpus petitions filed by federal prisoners in
4 the district of confinement by providing an equally broad remedy in
5 the more convenient jurisdiction of the sentencing court. United
6 States v. Addonizio, 442 U.S. 178, 185 (1979). Under 28 U.S.C.
7 § 2255, a federal sentencing court may grant relief if it concludes
8 that a prisoner in custody was sentenced in violation of the
9 Constitution or laws of the United States. United States v.
10 Barron, 172 F.3d 1153, 1157 (9th Cir. 1999).

11 In reviewing a § 2255 motion, a federal court shall hold an
12 evidentiary hearing "unless the motion and the files and records of
13 the case conclusively show that the prisoner is entitled to no
14 relief." 28 U.S.C. § 2255. The motion must provide specific
15 factual allegations which, if true, state a claim on which relief
16 could be granted. United States v. Schaflander, 743 F.2d 714, 717
17 (9th Cir. 1984).

18 DISCUSSION

19 Respondent proffers several arguments that the motions should
20 be denied. All of them are well-taken.

21 I. Procedural Default

22 Respondent argues that Movants' claims should be denied
23 because they failed to raise the issues before the Court at
24 sentencing or on direct appeal. The Ninth Circuit has held that a
25 petitioner may not attack a sentence collaterally under § 2255 if
26 he did not challenge it at sentencing or on direct appeal. See
27 Johnson v. United States, 362 F.3d 636, 638 (9th Cir. 2004); United

1 States v. Schlesinger, 49 F.3d 483, 485 (9th Cir. 1994). Movants
2 do not respond to this argument. Therefore, Movants' claims must
3 be denied on this basis alone. In the interests of justice, the
4 Court will address the other arguments presented by Respondent.

5 II. Movants Waived Their Right to File a § 2255 Motion

6 Respondent argues that Movants are precluded from filing
7 § 2255 motions because in their plea agreements they agreed not to
8 attack their convictions or sentences collaterally for any reason
9 other than ineffective assistance of counsel.

10 In their plea agreements, Movants agreed to the following
11 provision, "I agree not to file a collateral attack on my
12 conviction or sentence, including a petition under § 2255, . . . at
13 any time in the future after I am sentenced, except for a claim
14 that my constitutional right to the effective assistance of counsel
15 was violated." Cabrera Plea Agreement, ¶ 5, Velo-Perez Plea
16 Agreement, ¶ 5. The Ninth Circuit enforces waivers of appellate
17 rights and the right to challenge collaterally the length of a
18 sentence in criminal cases, where waivers are provisions of a
19 negotiated plea agreement. See United States v. Abarca, 985 F.2d
20 1012, 1014 (9th Cir. 1993). The right to bring a collateral attack
21 under § 2255 is statutory and a knowing and voluntary waiver of a
22 statutory right is enforceable. Id. Movants do not argue that
23 their waivers were unknowing and involuntary. Therefore, except
24 for Cabrera's ineffective assistance of counsel claim, Movants'
25 claims must be denied on this basis.

26 III. Merits of Movants' Claims

27 Respondent argues that, for a variety of reasons, Movants'
28

1 claims have no merit. The Court will address several of these
2 arguments.

3 A. Deportable Alien Status

4 Movants argue that, because of their deportable alien status,
5 they are ineligible for detention in a minimum security facility
6 for the last ten percent of their sentences to prepare for and
7 adjust to re-entry into the community as provided by 18 U.S.C.
8 § 3624(c), and should therefore be granted a downward departure to
9 account for this ineligibility. As stated in United States v.
10 Alagbe, 2006 WL 1529981 *4 (N.D. Cal.), the sentencing guidelines
11 do not mention deportable-alien status as a sentencing factor and
12 departures based on factors not mentioned in the guidelines are
13 infrequent. Furthermore, Congress has designated the Bureau of
14 Prisons (BOP) as the agency with the authority to determine where a
15 prisoner is incarcerated; by departing downward because of a
16 prisoner's place of detention, the sentencing court would be
17 interfering with the BOP's authority. Id. (citing United States v.
18 Charry Cubillos, 91 F. 3d 1342, 1344 (9th Cir. 1996)). Therefore,
19 Movants' claims must be denied on this basis.

20 B. Equal Protection and Due Process Claims

21 Movants allude to the fact that their equal protection rights
22 have been violated on the basis of their status as deportable
23 aliens. This claim was also addressed in Alagbe, where the court
24 stated that any disparity with respect to equal protection "is
25 justified by the legitimate basis in protecting against the
26 increased security risk of those facing deportation, the fact that
27 those being deported do not need to integrate into the community,

1 and Congress' plenary power over alien affairs." Alagbe, 2006 WL
2 1529981 at *4. For this reason, Movants' Equal Protection Claim is
3 denied on the merits. Furthermore, Movants provide no authority to
4 support their argument that their due process rights were violated
5 by not being granted a downward departure.

6 C. Ineffective Assistance of Counsel

7 In his reply brief, Cabrera raises for the first time an
8 ineffective assistance of counsel argument based on the fact that
9 counsel should have requested a downward departure based upon
10 Cabrera's minimal participation in the crime and cooperation with
11 law enforcement authorities. The Court will address this argument
12 even though Respondent has not had an opportunity to respond to it.

13 Contrary to Cabrera's representation, at the May 23, 2007
14 sentencing hearing, his counsel argued that Cabrera was not an
15 organizer or supervisor of the criminal activity nor was he a
16 sophisticated drug dealer and thus he should not receive a sentence
17 greater than eighty-seven months. Transcript of Sentencing
18 Hearing, Docket # 108 at 9, 19-20. Therefore, Cabrera's counsel
19 did not fail to raise the issue of a downward departure and his
20 representation of Cabrera did not constitute deficient performance.
21 See Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984) (to
22 prevail on a Sixth Amendment ineffectiveness of counsel claim,
23 petitioner must establish that counsel's performance was deficient,
24 that is, it fell below an "objective standard of reasonableness"
25 under prevailing professional norms and that he was prejudiced by
26 counsel's deficient performance). Therefore, this claim must be
27 denied.

1 D. Court Error

2 In his reply, Cabrera also raises for the first time the
3 argument that the Court committed error by not downwardly departing
4 four levels based on his minimal participation in the crime and his
5 cooperation with law enforcement authorities. At the sentencing
6 hearing, the Court considered all elements for reduction in
7 sentence and departed downward to impose a sentence of 108 months
8 as opposed to the sentence of 120 months that was recommended by
9 Respondent. The Court did not err in its imposition of Cabrera's
10 sentence.

11 CONCLUSION

12 For the foregoing reasons, Movants' motions for a downward
13 departure in sentencing are DENIED (Docket ## 86, 90).

14 IT IS SO ORDERED.

15
16 Dated: May 21, 2008



CLAUDIA WILKEN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

et al,

Plaintiff,

v.

et al,

Defendant.

Case Number: CR 05-00543 CW
CV07-05401 CW
CV07-05633 CW

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on May 21, 2008, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

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P.O. Box 3001-0001
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Dated: May 21, 2008

Richard W. Wieking, Clerk
By: Sheilah Cahill, Deputy Clerk